



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

May 18, 1990

Mr. James R. Hine  
Acting Commissioner  
Texas Employment Commission  
101 East 15th Street  
Austin, Texas 78701

Open Records Decision No. 556

Re: Availability to the claimant in a hearing before the Texas Employment Commission of certain administrative records held by the commission  
(RQ-1794)

Dear Mr. Hine:

You request reconsideration of OR89-259, an informal open records decision of this office. The information in question is a document referred to by the Texas Employment Commission (hereinafter, the "TEC") as the "Commission Appeal Summary/Recommendation" (hereinafter, the "summary"). The summary, among other documents, has been requested by the person (hereinafter, the "claimant") with respect to whose unemployment compensation claim the summary was prepared. You were advised in OR89-259 that the summary was not excepted from disclosure to the claimant under the Texas Open Records Act, V.T.C.S. art. 6252-17a. OR89-259 states, citing Attorney General Opinions H-626 (1975) and H-249 (1974), that the due process principles applied by the United States Supreme Court in Greene v. McElroy, 360 U.S. 474 (1959), entitle the claimant to the summary.

In your request for reconsideration, you assert that OR89-259 misconstrues the nature of the summary. The summary submitted for our inspection in this instance, prepared by an attorney on the staff of the Office of Commission Appeals, consists of a cover docket sheet (hereinafter, the "cover sheet") that includes the claimant's name, former employer, social security number, names of persons appearing at any appeals hearing, notations as to the documents contained in the file, dates of employment, dates of the initial claim for benefits, dates of any hearing, ending wage, the claimant's statement of the reason for separation from employment and the attorney's notation or conclusion as to the claimant's reason for

separation made after the attorney has listened to the tape or tapes of any appeals hearing(s) connected with the case.

The second part of the summary consists of three pages summarizing (1) the testimony of each person who testified at the hearing(s), (2) the file documents relevant to statements made in the hearing(s) by any party, (3) the rationale of the decision of the appeal tribunal from which either the claimant or employer has appealed to the Office of Commission Appeals and which has thus triggered the review and summary process, (4) the appeal made to the commission, and (5) the attorney's recommendation as to action that the commissioners should take concerning the claim, e.g., affirmation or reversal of the denial or award of unemployment benefits or affirmation or reversal of the tax charge-back to the employer's unemployment tax account. The attorney's recommendation is accompanied by a statement of the evidentiary basis or rationale for the attorney's recommendation.

Copies of these summaries by the attorneys of the Office of Commission Appeals are distributed to each of the three commissioners of TEC. You advise that these summaries are prepared for the commissioners' use in making a determination about a claimant's claim for unemployment benefits or an employer's unemployment tax liability.

You assert that the summary is excepted from public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(11) of the Open Records Act. You further assert that the application of these exceptions does not violate the due process rights of the claimant. We note at the outset that as the claimant is requesting information that relates to the claimant, exceptions to public disclosure designed to protect the privacy of the claimant are not applicable. V.T.C.S. art. 6252-17a, § 3B.

Section 3(a)(3) of the Open Records Act excepts "information relating to litigation . . . to which the state or political subdivision is, or may be, a party." This office has reasoned that "litigation" as used in section 3(a)(3) includes contested cases before administrative agencies. Open Records Decision Nos. 368 (1983); 301 (1982).

However, you advise that on April 14, 1989, the commission rendered its decision in this matter and denied a motion for rehearing. The case is, therefore, no longer pending before the administrative tribunal. You have not advised this office of any anticipation that the state may

be a party to any subsequent litigation with respect to the subject matter contained in the summary. Thus, we need not consider the applicability, if any, of section 3(a)(3).

Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 538 (1990); 470 (1987).

Objective observations of facts or events are not excepted from public disclosure by section 3(a)(11). Open Records Decision Nos. 450 (1986); 308 (1982). An examination of the summary submitted for our inspection in connection with this open records request reveals that only the last section of the cover sheet (entitled "C.A. Recommendation") and the last paragraph of the summary contain any advice, opinion, or recommendation. The balance of the summary is a factual statement of the case. Therefore only the last section of the cover sheet (entitled "C.A. Recommendation") and the last paragraph of the summary may be withheld from public disclosure under section 3(a)(11).

Section 3(a)(1) of the Open Records Act excepts from public disclosure "information deemed confidential by law." You assert that the summary is made confidential by the attorney-client privilege. See Open Records Decision No. 200 (1978). The attorney-client privilege protects confidential communications from the client to the attorney and from the attorney to the client. Id. The attorney-client privilege is ordinarily addressed by the courts in the context of evidentiary or discovery disputes in litigation. See Open Records Decision No. 462 (1987) (and authorities cited therein). The Open Records Act places the privilege in a somewhat different context. The summary was prepared by an attorney and reflects that attorney's skills. However, the attorney-client privilege aspect of section 3(a)(1), as it has been consistently applied by this office in open records matters, will except the summary from public disclosure only to the extent that it constitutes the legal advice and opinion of the attorney

preparing it for the commissioners. See, e.g., Open Records Decision Nos. 429 (1985); 80 (1975).

An examination of the summary which is the subject of this request reveals that, with the exception of the last section of the cover sheet and the last paragraph, the summary consists exclusively of a factual recitation of the case before the commission. Only the last section of the cover sheet and the last paragraph of the summary contain any legal analysis or advice. Thus, the only part of the summary which is arguably within the attorney-client privilege is that part which we have already found to be excepted under section 3(a)(11). For this reason we need proceed no further with our analysis of the attorney-client privilege as it applies to the requested information. Accordingly, we do not decide whether the attorney-client privilege applies to the information already excepted under section 3(a)(11).

Finally, having resolved the statutory questions, we turn to the constitutional concern. The question is whether the claimant has a due process right to the remaining paragraph of the summary containing the advice, opinion, and recommendation of the TEC attorney to the commission.

In Attorney General Opinion H-249, relying on Greene v. McElroy, supra, this office stated, "[T]o the extent a decision denying or awarding benefits or other rights to a welfare client is based on information in his file, he is entitled to review all information entering into the decision, whether it is purely factual or not. This right is not dependent upon the Open Records Act, . . . and its exceptions do not apply." In Attorney General Opinion H-626, this office found that due process requires the TEC to provide a claimant with each of eight types of records about which TEC has made inquiry when the record is used in making a determination concerning that claimant. None of the records in question in Attorney General Opinion H-626 is analogous to the summary.

Greene v. McElroy involved the revocation of a government contractor's employee's security clearance. The Supreme Court found that Mr. Greene had not been afforded the safeguards of confrontation and cross-examination required by due process because the government had relied on the reports and statements of confidential informants that were not made available to Mr. Greene. Speaking for the Court, Chief Justice Warren said:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

360 U.S. at 496 (emphasis added).

With respect to the information in question here, the claimant has access to all of the information gathered by TEC or adduced by parties and witnesses in the administrative process leading to the final determination by the commission. The summary does not adduce new evidence or testimony to which the claimant has not had an opportunity to respond. Moreover, the final decisions of TEC include statements of the commission's findings of fact and conclusions of law. Thus, the claimant has notice of the facts and law relied on by the commission in making its final determination. Though not applicable to TEC hearings to determine whether a claimant is entitled to unemployment compensation, it is instructive to note that section 17 of the Administrative Procedure and Texas Register Act, V.T.C.S. art. 6252-13a, expressly permits ex parte consultations within an agency for the purpose of evaluating the evidence in a contested case. This provision was recently considered by the Texas Supreme Court. The court expressed no due process concerns regarding this provision. Acker v. Texas Water Comm'n, 33 Tex. Sup. Ct. J. 443 (May 2, 1990). We conclude that due process has been satisfied.

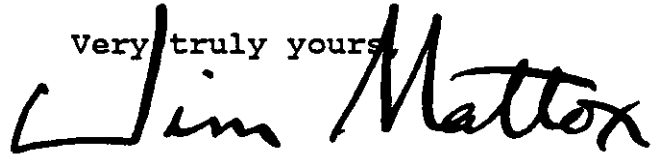
In conclusion, we find that informal open records decision OR89-259 construed Attorney General Opinions H-626 and H-249 too broadly. OR89-259 is overruled to the extent of any conflict herewith. You may withhold the last section of the cover sheet (entitled "C.A. Recommendation") and the last paragraph of the summary under section 3(a)(11). The balance of the summary must be released.

#### S U M M A R Y

The advice, opinion, and recommendation of a commission employee, prepared for the use of the commissioners in making a decision in a contested case before the Texas Employment Commission may be withheld from

the claimant in the case under section  
3(a)(11) of the Open Records Act.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly slanted style.

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